

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: March 26, 2004

TO : Earl L. Ledford, Acting Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Christ Hospital
Case 9-CA-40750

506-6050-7560
512-5012-0133-4800

This case was submitted for advice as to whether recovery room nurses in an acute care hospital lost statutory protection when they engaged in an unannounced sick-out against their Employer. We conclude that under the specific factual circumstances, the Employer did not unlawfully discharge the nurses because they failed to take reasonable precautions to protect the Employer from foreseeable imminent danger caused by their sudden cessation of work.

FACTS

The Christ Hospital operates an acute care hospital in Cincinnati, Ohio. The Hospital employs registered nurses who work in its Post Anesthesia Care Unit (PACU), commonly known as the recovery room. The PACU nurses are unrepresented.

On November 3, 2003,¹ the Employer announced that it would offer certain registered nurses, excluding the PACU nurses, a \$30,000 retention bonus, to be paid over a three-year period. PACU nurses were upset with being excluded from the bonus offer and made their displeasure known during meetings with Joyce Burke, the PACU supervisor, and Mary Wiethe, the Director of Perioperative Care. To address the nurses' concerns, Wiethe and Burke arranged a meeting with Patient Care Services Vice-President, Vic DiPilla. On November 5, DiPilla, Wiethe and Burke indicated that PACU nurses were unlikely to receive the bonus.

Following the meeting, some PACU nurses began to plan a sick-out in protest of the Employer's failure to offer them the bonus. They decided on calling in sick before the start of the morning shift on November 6. A PACU nurse stated that a fellow nurse who also participated in the sick-out suggested that they make the sick-out more effective by calling in sick that Thursday rather than the next day, so that the Hospital would not have the weekend to find

¹ All dates refer to 2003, unless otherwise stated.

replacements for them, which would make the sick-out "more effective."

The PACU nurses did not give the Employer any notice of the impending sick out. However, on November 5, a local television station reported on its evening news that the recovery room nurses were going to engage in a sick-out the next day. The Employer denies, and there is no evidence to the contrary, that Hospital management had any knowledge of an impending sick-out through the television news report or by any other means.

On November 6, certain PACU day shift nurses began calling in sick. The calls commenced at about midnight and ended about 6:00 a.m., in advance of their approximate 8:00 a.m. shift. The Hospital had scheduled 88 surgeries for that day, starting early in the morning, each of whom would go through the PACU recovery room for post-operative care.²

By about 6:00 a.m. on November 6, eleven out of fourteen PACU nurses scheduled to work that morning had called in to tell the Employer that they would not be reporting for work. The Hospital states that it did not realize until about 5:00 a.m. that they had a staffing problem. At around that time, Hospital management began the process of finding replacements. It attempted to replace the missing nurses with a combination of other PACU nurses (it employs approximately 25 to 27 PACU nurses in total), temporary "agency nurses," supervisors, and nurses from other units.

Despite their efforts, the Hospital was unable to obtain sufficient nurses to fully staff the PACU. Consequently, the Hospital was forced to cancel twelve of 88 surgeries scheduled for that day. Included among the postponed surgeries were two hysterectomies, a colon resection, a craniotomy for a brain cancer patient with a tumor, a thyroidectomy, a prostatectomy for a prostate cancer patient, a gastric stapling and a total hip replacement. In addition, the recovery of two patients undergoing amplatzer surgery (procedures to repair holes in a patient's heart to prevent a stroke) had to be relocated to another unit of the Hospital that does not normally handle such recoveries.

In the late afternoon of November 6, the Employer, by courier, sent each of the nurses who failed to report to

² This number apparently is normal and this fact was known to the nurses at the time they decided to engage in the sick-out.

work letters advising them that they were suspended without pay until further notice for their refusal to work their schedule and for patient abandonment. By letters dated November 12, eight striking nurses were discharged for conduct seriously detrimental to patients.³

ACTION

We conclude that the Employer did not violate the Act when it discharged eight registered nurses for engaging in a sick-out, because, under Marshall Car Wheel & Foundry Co.,⁴ the nurses failed to take "reasonable precautions" to protect the Hospital from "foreseeable imminent danger" caused by their sudden cessation of work.

Hospital employees, like all statutory employees, enjoy the basic right to strike afforded by Section 7. Of course, this right is subject to certain limitations, including the Board's imposition of additional measures on some employees who, because of the nature of their jobs, have a "duty to take reasonable precautions to protect the employer's physical plant from such imminent damage as foreseeably would result from their sudden cessation of work."⁵ The touchstone, thus, is the employees' "reasonable" response to "foreseeable" damage to the Employer; a strike can lose statutory protection without causing actual damage.⁶ In the health care field, the Board has recognized that risk of harm to patients is a factor in deciding whether a strike is protected.⁷ Employees who strike in breach of their obligation engage in unprotected activity for which they may be disciplined or discharged.⁸ However, employees need not act as an insurer and need not take every precaution to

³ One nurse was suspended but not discharged after she provided written evidence of an illness, another nurse quit after she was suspended, and the final discharged nurse declined to participate in this unfair labor practice charge.

⁴ 107 NLRB 314 (1953), enf. den. 218 F.2d 409 (7th Cir. 1955).

⁵ Marshall Car Wheel, 107 NLRB at 315.

⁶ Bethany Medical Center, 328 NLRB 1094 (1999).

⁷ Id.

⁸ Marshall Car Wheel, 107 NLRB at 315.

secure the employer's property for an indefinite period of time.⁹

Whether a strike loses its statutory protection often revolves around whether the employees orchestrated their strike in such a way as to preclude the employer from finding replacements. In International Protective Services,¹⁰ the Board held that a strike by a union of security guards was not protected by the Act because it was foreseeable that the guards' sudden work stoppage exposed Federal buildings and their occupants to foreseeable danger. The Board noted that the union attempted to capitalize on the element of surprise by striking at the most inopportune time (during a scheduled conference of FBI agents), with no warning, and with no instructions that guards stay at their post until relieved. The Board adopted the judge's conclusion that the union had designed the strike "knowing that it was very difficult to quickly assemble qualified replacement guards."¹¹

Under the particular circumstances of this case, we conclude that, by their specific method of striking, the PACU nurses lost the Act's protections.¹² The evidence establishes that the employees orchestrated the sick-out to ensure that the Employer would not be aware of the magnitude of the strike until just hours before the start of their shift. In fact, one of the striking nurses acknowledged that the strike was designed in part to hinder the Hospital's ability to find replacements. Thus, individual nurses notified the PACU over a six hour period from midnight to about 6:00 a.m. that they would not be at work that morning. This delayed the Employer's realization of an impending staffing problem until about 5:00 a.m., only hours prior to the start of the morning shift. Although the Employer attempted at that time to secure full staffing through various channels, it was unable to do so. The resulting partial staffing caused the cancellation of twelve out of 88 surgeries that day (some of which were not elective), as

⁹ Reynolds & Manley Lumber Co., 104 NLRB 827, 828-29 (1953), enf. den. 212 F.2d 155 (5th Cir. 1954).

¹⁰ 339 NLRB No.75 (2003).

¹¹ Id., slip op. at 3.

¹² The walkout did not violate the strike notice requirements of Section 8(g) because those strictures apply only to labor organizations, not to unrepresented groups of employees engaged in collective action. Walker Methodist Residence, 227 NLRB 1630 (1977).

well as the relocation of two recovering heart patients to a unit not normally assigned that sort of work. Thus, on balance, we conclude that the PACU nurses failed to take "reasonable precautions" to protect the Hospital from "foreseeable imminent danger," in this case, the cancellation and rescheduling of scheduled surgeries.

The PACU nurses' sick-out is distinguishable from other, protected walkouts called with little advance notice, where there was no foreseeable risk of danger because the immediate dislocation caused by the walkout was little different than the employers' routine practices.¹³ In these cases, the Board further noted that the walkouts did not result in a foreseeable risk of harm because other, non-striking individuals were available to cover for the strikers, if necessary.¹⁴

Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.

¹³ See Bethany Medical Center, 328 NLRB at 1094-95 (catheterization laboratory employees' engaged in protected walkout, despite delays in some procedures; employer routinely tolerated similar delays for reasons other than a concerted walkout); Vencare Ancillary Services, 334 NLRB 965, 971 (2001) (strike by occupational and physical therapists resulting in the rescheduling of patient appointments did not cause foreseeable imminent danger; walkout's effect on patient care was little different than therapists' routine discretion to delay and reschedule patient appointments).

¹⁴ Bethany Medical Center, 328 NLRB at 1095; Vencare Ancillary Services, 334 NLRB at 971.